

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion Into Competition for
Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion Into Competition for
Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

**ADMINISTRATIVE LAW JUDGE'S RULING
GRANTING MOTION TO COMPEL DISCOVERY**

This ruling grants the motion jointly filed on April 17, 2002, by InfoNXX, Inc., Metro One Telecommunications, Inc., and WorldCom, Inc. (collectively, "Moving Parties") for an Expedited Order Compelling Response to Discovery ("Motion to Compel").¹ Moving Parties seek an order compelling SBC Pacific Bell (Pacific) to produce copies of Directory Assistance Listing and Information Service ("DALIS") cost studies prepared by SBC-affiliated companies in other states. Moving Parties claim that the requested documents are required in order to prepare timely responses to Pacific's recently filed DALIS cost study in this proceeding.

¹ Parties filed their motion both in a redacted version (for public distribution) and in an unredacted version (containing confidential data filed under seal).

Pacific filed a reply to the Motion on April 19, 2002. Pacific objects to providing the requested documents, arguing that cost studies covering other states are completely irrelevant to the DALIS cost study filed in California, and are not reasonably calculated to lead to the discovery of admissible evidence. Pacific argues that the DALIS cost study that it filed on March 25, 2002 did not rely on any out-of-state costs or on any costing methodologies developed by other state public utilities commissions. Pacific lacks familiarity with the methodologies approved by other state public utilities commissions for the development of costs and prices, but claims they are not relevant to California.

Parties Position

Moving Parties argue that the ability to compare SBC affiliate reported costs with those reported by Pacific is critical to testing for logical or factual errors in Pacific's filed cost studies. Moving Parties claim that there is substantial commonality among SBC Pacific and other SBC affiliates with respect to costs incurred in providing competitive access to DA data. For example, that SBC Services, Inc. owns and maintains the DALIS records that are the source of the files referred to in Pacific's study. Likewise, the provision of competitive access to the DALIS database is largely undertaken through the efforts of non-SBC Pacific employees. The responsibilities of some of these employees include SBC regions outside of California.

Moving Parties also believe that much of the same information systems hardware and software used to furnish competitors with Pacific DA data are also used to furnish competitors with DA data pertaining to other SBC affiliates. Moving Parties argue that examination of differences in the costing methodologies employed and reported costs for the same functions in other states may disclose factual or logical errors in Pacific's studies.

Pacific responds that mere ownership of DALIS database records does not make out-of-state cost studies any more relevant to this California proceeding. Pacific points out that SBC Services, Inc. maintains these databases in Fairfield, California and San Diego, California. Thus, Pacific claims there is no connection between the maintenance of Pacific's California DALIS database and the relevance of out-of-state cost studies.

Pacific further argues that the fact that employees of SBC-affiliated companies provide competitive access to the DALIS database does not render all out-of-state cost studies relevant. Pacific presumes that Moving Parties are attempting to frame an argument that out-of-state cost studies are necessary to confirm that out-of-state costs attributable to these employees were excluded in the California DALIS study. Pacific believes that information already provided demonstrates that no out-of-state costs were included in the California study, and that the out-of-state studies shed no light on the question of what was included or excluded in the study.

Pacific further claims that commonality of hardware and software does not render out-of-state studies relevant to this proceeding. Pacific claims that the California cost group did not rely on out-of-state costs of hardware and software in developing its DALIS cost study, but looked *only* at California-specific costs, using Commission-approved cost study methods.

Pacific claims that the likelihood of differences in out-of-state costing methodologies and reported costs is *exactly* why the out-of-state studies should not be produced. Pacific argues that its cost study must be evaluated in light of the California Commission's costing principles, and not under methodologies adopted by another state jurisdiction.

Discussion

Pacific's objections turn on the issue of whether the requested cost studies are reasonably calculated to lead to the discovery of admissible evidence. In order to meet this criterion, there is no requirement that every single dollar of costs in the requested documents covering other states match exactly with the costs incurred in California. Yet, the requested documents must be reasonably calculated to lead to the discovery of relevant evidence concerning the proper level of DALIS costs in California.

Comparison of costs from other state jurisdictions may reveal certain common characteristics with the costs in Pacific's study, but may also contain various dissimilarities that are not relevant to California. In this instance, Moving Parties have identified certain commonalities in labor and hardware resources used to provide DA service by SBC both on behalf of its California affiliate as well as affiliates in other states. Pacific has likewise noted that potential differences may exist between the costing and pricing methodologies between these states.

The fact that differences may exist, therefore, does not necessarily render any comparative analysis of such costs irrelevant. Discovery can potentially lead to admissible evidence provided that any such dissimilarities which are not relevant can be identified and excluded. Unless Moving Parties gain access to the cost studies, however, they cannot ascertain which, if any, cost comparisons may be relevant or irrelevant to this proceeding.

The proper ruling, therefore, is not to throw the baby out with the bath water by categorically denying parties any opportunity to review and compare affiliate costs across different state jurisdictions. Rather, the proper disposition is to grant the motion for discovery, but hold parties to the burden of

demonstrating that any claimed differences in cost between jurisdictions are due to relevant factors. Likewise, Pacific may present opposing evidence to refute evidence of comparability with SBC affiliate costs in other state jurisdictions. For example, differences in other states that were merely due to costing methodologies that are not applicable in California, would not be relevant.

The mere fact that Pacific did not expressly rely upon out-of-state data in preparing its cost studies, however, does not render such data irrelevant. Pacific is not entitled to control the scope of relevant discovery by limiting it to specific data sources upon which it chooses to rely. Opposing parties are not prohibited from discovering opposing sources of data merely because Pacific has not chosen to rely upon them. The test for relevancy is not whether one party (*i.e.*, Pacific) relied upon a particular source, but rather whether the data source is relevant overall to the Commission's determination of DALIS costs. The cost studies from other jurisdictions may, for example, lead to admissible evidence offered for the purpose of potential impeachment, which is a relevant consideration.

Given these considerations, the Motion to compel Pacific to respond to discovery as specified above is granted.

IT IS RULED that:

1. The motion of InfoNXX, Inc., Metro One Telecommunications, Inc., and WorldCom, Inc. (collectively, "Moving Parties") for an Expedited Order Compelling Response to Discovery is hereby granted.

2. SBC Pacific Bell (Pacific) is directed to comply with the moving parties discovery request. Pacific shall accordingly promptly deliver to the moving parties a complete copy of the most recent cost study developed by each SBC affiliate Incumbent Local Exchange Carrier and submitted to a state or federal

regulatory body estimating the cost of providing Directory Assistance Listing and Information Service (DALIS) listings to an unaffiliated company.

3. In testimony, parties shall bear the burden of proof that any claimed DALIS cost comparisons of California with other state jurisdictions are the result of relevant factors. Pacific may likewise present evidence refuting any claims that cost differences with other out-of-state SBC affiliates are based on relevant comparisons.

Dated April 23, 2002, at San Francisco, California.

/s/ Thomas R. Pulsifer

Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Motion to Compel Discovery on all parties of record in this proceeding or their attorneys of record.

Dated April 23, 2002, at San Francisco, California.

/s/ Antonina V. Swansen

Antonina V. Swansen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.